STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE TERREL AUSTIN,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 344703

Circuit Court No. 17-010362-01 FC

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Deandre Austin was convicted at a jury trial in the Wayne Circuit Court. He claimed an appeal by right in the Court of Appeals, which affirmed his convictions in an unpublished per curiam opinion. *People v Austin*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 344703). This application is being timely filed within 56 days of that opinion. MCR 7.305(C)(2).

STATEMENT OF QUESTIONS INVOLVED

I.A. When instructing a jury on the reasonable-doubt standard, a trial court cannot compare the decision whether to convict to an everyday decision that the jurors would otherwise make. Here, the trial court compared the reasonable-doubt standard to, among other things, calling up a friend and asking her opinion about a personal matter. Were the court's instructions erroneous?

The trial court did not answer.

The Court of Appeals answered, "No."

The defense answers, "Yes."

I.B Trial counsel must ensure that the trial court's instructions faithfully communicate the reasonable-doubt standard to the jury. Here, the trial court erroneously compared the reasonable-doubt standard to, among other things, calling up a friend and asking her opinion about a personal matter. Was trial counsel ineffective by failing to object?

The trial court did not answer.

The Court of Appeals answered, "No."

The defense answers, "Yes."

II. For a killing to qualify as felony-murder, the murder must occur during the res gestae of the felony. In this case, the killing occurred before the res gestae of the felony

began. Was the evidence therefore insufficient to support the felony-murder conviction?

The trial court did not answer.

The Court of Appeals answered, "No."

The defense answers, "Yes."

III. Trial counsel has a duty to request an instruction on voluntary manslaughter if a rational view of the evidence would support such an instruction. In this case, the evidence showed that the victim attacked the shooter, provoking the shooter to fire at the victim. Did trial counsel commit ineffective assistance by failing to request a voluntary manslaughter instruction?

The trial court did not answer.

The Court of Appeals answered, "No."

The defense answers, "Yes."

INTRODUCTION

More than 100 years ago, this Court held that a trial court cannot compare a jury's task in applying the reasonable-doubt standard to "the judgment which you use in the ordinary affairs of life." *People v Albers*, 137 Mich 678, 690–691; 100 NW 908 (1904). As this Court explained, "It may be said that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt." *Id*. at 691 (cleaned up). Here, though, the trial court judge, in a freewheeling explanation of the reasonable-doubt standard, compared the jury's task to calling up a friend and asking her opinion about a personal matter. "We do this all the time," the judge said. Stunningly, the Court of Appeals found nothing wrong with the judge's instruction. This Court should find otherwise. And considering this and other errors, this Court should reverse and remand for a new trial.

* * *

In the first hours of April 15, 2017, six people who otherwise would have never crossed paths found themselves together in a deadly situation. The victim in this case, a limousine driver, shuttled three young men from Toledo to Detroit for a concert. Afterward, the driver took them to a bar he knew. There, the driver met up with two other men—one in a Chicago Bears jacket and the other dressed in all black—who sold him cocaine. Eventually, the driver, the concert-goers, and the two other men all ended up in the limousine. The man in black and the driver argued over the quality of the cocaine that the man in black had sold the driver. At some point, the driver attacked the man in black, who then shot and killed the driver. The man in black

then robbed the three concert-goers and fled into the night. Deandre Austin was later identified as the man in black. He was convicted of felony-murder and attendant crimes.

But the trial in this case suffered from three critical errors. First, the trial court misstated the reasonable-doubt standard, comparing the decision whether to convict or acquit to calling up a friend and asking her opinion about a personal matter. The court's instruction demeaned the reasonable-doubt standard and lowered the bar for conviction. Concomitantly, trial counsel rendered ineffective assistance by failing to object.

Second, felony-murder was not an appropriate charge given the facts of the case. In particular, the killing did not occur during the res gestae of the robbery of the concert-goers. The robbery and the killing were also independent of one another and not causally related.

Finally, trial counsel should have requested a voluntary manslaughter instruction. Again, the evidence showed that the driver attacked the man in black immediately before the shooting. A violent attack has long been considered adequate provocation to reduce a killing from murder to manslaughter. Trial counsel's neglect in this regard constitutes ineffective assistance.

Respectfully, the Court of Appeals gave inadequate consideration to these significant claims of error. Therefore, Austin now turns to this Court.

STATEMENT OF FACTS

Following a jury trial in the Wayne Circuit Court, Judge Vonda R. Evans presiding,[1] Deandre Austin was found guilty of felony-murder, MCL 750.316; three counts of armed robbery, MCL 750.529; felon-in-possession of a firearm, MCL 750.224f; and felony-firearm, MCL 750.227b. The court sentenced Austin to spend the rest of his life in prison without the possibility of parole. He appealed by right in the Court of Appeals, which affirmed his convictions in an unpublished per curiam opinion. *People v Austin*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 344703) (K.F. KELLY, P.J., BORRELLO AND SERVITTO, JJ.). Austin now applies for leave to appeal in this Court.

For ease of reference, the pertinent transcripts in this case will be referred to as follows:

Tr I = Jury trial, Vol I, 3/5/18
Tr II = Jury trial, Vol II, 3/6/18
Tr III = Jury trial, Vol III, 3/7/18
Tr IV = Jury trial, Vol IV, 3/8/18
Tr V = Jury trial, Vol V, 3/14/18
Tr VI = Jury trial, Vol VI, 3/15/18

The leadup to the shooting

On the evening of April 14, 2017, friends Jameson Sheely, Scott Zaborowski, and Thomas Stover took a limousine from Toledo to Detroit to attend a Gucci Mane concert at the Fox Theatre. (Tr II, 29-30, 84, 127). Sheely's father had chartered the limousine (Tr II, 29-30), which was driven by Devin Lowe.

[1] Judge Evans has since resigned.

The three friends gave largely consistent accounts of events early in the night. On the way from Toldeo to Detroit, all three were drinking, and Zaborowski and Stover were also smoking marijuana. (Tr II, 31, 85-86, 127). At the concert, the three had more drinks. (Tr II, 31, 85-86, 128). The concert ended at about midnight. (Tr II, 31). Afterward, Sheely tried calling Lowe to pick them up, but Sheely couldn't reach Lowe. (Tr II, 31, 87, 129-130). The three friends decided to go to a nearby bar, where they had more drinks. (Tr II, 31-33, 87, 129).

Approximately thirty to forty-five minutes later, Lowe picked them up at the bar. (Tr II, 33, 87, 129-130).[2] Lowe suggested that he take them to Delux Lounge in Detroit, and they all agreed. (Tr II, 35-36, 88-89, 130).[3]

At Delux, the three friends drank more and danced. (Tr II, 36, 89, 131). Lowe also came into the bar. (Tr II, 36, 131). Lowe met up with two other men, one who was wearing a Chicago Bears jacket and another who was wearing all black. (Tr II, 46-48, 89-90, 132). As explained below, one or both of the men likely sold Lowe cocaine at the bar.

Sheely, Zambrowski, and Stover left the bar at approximately 3:00 a.m. and returned to the limousine. (Tr II, 36, 89-90, 131). The two men that Lowe had been talking to came with them. (Tr II, 46-47, 90, 131-132). Lowe said that he was going to

[2] Lowe's whereabouts during this time were not ascertained on the record.
[3] There was also testimony that three women accompanied them into the limousine. Zabrowski and Stover each made out with one girl and smoked marijuana with them. The girls then left the limousine. (Tr II, 33-34, 87-89).

drop the two men off at a gas station. (Tr II, 50, 90, 132). Zaborowski recalled seeing the man in black smoking cigarettes in the limousine. (Tr II, 119).

The shooting

Although their accounts diverged on some details, Sheely, Zaborowski, and Stover were mostly consistent on the events leading to the shooting.

After they drove away from Delux, an argument began over cocaine. Sheely recalled that it was between Lowe and both of the unknown men. (Tr II, 49, 51). Sheely testified that the argument was about the "quality of the product" (Tr II, 51), that is, Lowe was not happy with the cocaine he had bought (Tr II, 52). Sheely also testified that there were "countless attempts to try and sq—squelch the argument" (Tr II, 50) by him, Zaborowski, and Stover (Tr II, 52).

By the time they pulled into a gas station, the argument was continuing. (Tr II, 53). Lowe got out of the driver seat and came to the back of the limousine. (Tr II, 53, 90-91).[4] There, the argument continued, and there was some discussion of a "trade." (Tr II, 54). Zaborowski testified that Lowe bought cocaine from one of the men and then snorted it. (Tr II, 91-92). Zaborowski added that Lowe was not happy with the quality of the cocaine. (Tr II, 93). Stover recalled Lowe and the man in black arguing over $50. (Tr II, 135). Lowe then returned to the driver seat. (Tr II, 55).

Stover and the man in the Bears jacket then went into the gas station together. (Tr II, 55). When Stover and the man in the Bears jacket later exited the gas station,

[4] Stover did not recall this point. (Tr II, 135).

Lowe got out of the driver seat and Stover got back into the limousine. (Tr II, 57).[5] Lowe followed behind him. (Tr II, 57).

Lowe then lunged at the man in black. (Tr II, 76-77). Zaborowski testified that Lowe "seem[ed] to rush" the man in black. (Tr II, 95). Zaborowski also described it as a "dive" (Tr II, 96), with Lowe lunging forward with his hands extended. (Tr II, 97). Stover testified that Lowe had been pulling away from the gas station but he got upset, put the limousine in park, and came to the back. (Tr II, 137). Lowe confronted the man in black, saying, "Oh, you played me. How can you do this to me?" (Tr II, 143-144). Stover testified that Lowe then came inside and "looked as if he was trying to reach into the pockets of the gentleman in all black." (Tr II, 144).

As Lowe attacked the man in black, the man in black pulled out a gun and shot and killed Lowe. (Tr II, 57-58, 60, 105). Zaborowski estimated that he heard five to seven gunshots. (Tr II, 105). Stover estimated eight or nine. (Tr II, 145).

The robbery

After Lowe was shot, the man in black turned to Sheely and put the gun to his head and said, "Give me your shit, motherfucker." (Tr II, 58). Sheely gave the man his watch, a gold wrist bracelet, and a gold chain necklace. (Tr II, 59). The man then put the gun to Zaborowski's head. (Tr II, 109). Zaborowski offered his watch, but the man didn't want it. (Tr II, 109). The man next put the gun to Stover and took his

[5] Stover testified that he was already in the limousine when Lowe got in. (Tr II, 135).

necklace chains. (Tr II, 146-147). The man then ran away. (Tr II, 61, 110, 152). The man in the Chicago Bears jacket had also fled by this point. (Tr II, 61).

After their ordeal, Sheely, Zaborowski, and Stover went inside the gas station and called the police. (Tr II, 62, 111, 154).

The police investigation

Police obtained security camera video from several of the locations involved in this case. (Tr II, 9-24). The video generally corroborated the story of the three young men regarding the events of the night in question. (Tr II, 137-153). The identity of the shooter, though, was not definitively established through the video evidence.

A Jovan McDade quickly became a suspect after a tip came in. (Tr IV, 33-34). Police prepared a lineup to present to Sheely, Zaborowski, and Stover. (Tr IV, 35). Zaborowski and Stover identified McDade as the shooter. (Tr IV, 36). Sheely identified another person. (Tr IV, 35-36). McDade, though, was eventually excluded as a suspect because police could find no evidence linking him to the crime. (Tr IV, 37-38). Austin was not yet a suspect at this point. (Tr IV, 36).

The medical examiner found that Lowe indeed had cocaine in his system when he died. (Tr IV, 69).

The man in the Chicago Bears jacket comes forward

The day after the shooting, Donta Etchen walked into a Detroit police precinct and told police that he was the man who had been with the shooter. (Tr III, 173-174; Tr IV, 6). He explained, "[P]eople were tellin' me they seened [sic] it on the news, and

this and that; my family members, and stuff. So, I wanted to turn myself in and clear my name on the situation." (Tr III, 174).

Etchen testified that he had been bar hopping in Detroit before the shooting. (Tr III, 144). At some point he ran into an acquaintance he knew as "Black." (Tr III, 145). Etchen's testimony on his relationship with Black was, in a word, confusing. Etchen testified that he knew Black because "we all hang downtown." (Tr III, 148). But in his very next answer, he said, "I never hung out with him." (Tr III, 148). "[Y]ou get familiar with people," Etchen added, " 'cuz some of the same people be around." (Tr III, 148). Still, he testified that he had seen Black "numerous" times. (Tr III, 149). He also testified that he knew Black's name "from people" and "from bein' around." (Tr III, 149).

Etchen testified that he and Black eventually went to Delux that night. (Tr III, 146). There, he ran into "three white guys and one black guy," meaning Lowe, Sheely, Zaborowski, and Stover. (Tr III, 147). According to Etchen, he got into the limousine with Black because "they"[6] wanted to get high on cocaine and marijuana. (Tr III, 151). Black sold Lowe cocaine "a couple times" both at Delux and after they all left Delux. (Tr III, 156). Etchen also admitted selling Lowe cocaine about four times at Delux. (Tr III, 196-199). Etchen claimed that Black "barged in behind [his] back" to sell cocaine to Lowe. (Tr III, 198). According to Etchen, Lowe snorted the cocaine both at Delux and in the limousine. (Tr III, 157).

[6] Who "they" referred to isn't clear from the context.

Etchen testified that when Lowe first came to the back part of the limousine, he expressed dissatisfaction with the cocaine he had bought from Black. (Tr III, 156-158). Black ignored Lowe. (Tr III, 164-165). Etchen recalled then going into the gas station with Stover. (Tr III, 158-159). Etchen later got back into the limousine but had to get out so Lowe could get in. (Tr III, 160). Etchen recalled going into the gas station a second time. (Tr III, 161). At some point, Lowe "was askin' for a better quality or his money back." (Tr III, 162). Black ignored Lowe, but Lowe "kept pressin' the issue." (Tr III, 163). Etchen testified that "both started gettin' word aggressive, you know." (Tr III, 163). Etchen also said that Lowe and Black were getting "angry." (Tr III, 163).

According to Etchen, Black then pulled a gun out. (Tr III, 164). Etchen left his wallet and got out of the limousine, not wanting to be shot. (Tr III, 164-165). As he was walking away, he heard about six or seven gunshots and took off. (Tr III, 165-166).

At trial, Etchen identified Austin as "Black." (Tr III, 146-147). He had also identified Austin in a photo array. (Tr III, 174-177).

But Etchen's testimony was far from flawless. He was in jail on unrelated charges at the time of trial, although he claimed that no promises had been made to him in exchange for his testimony. (Tr III, 143). On cross-examination, he was largely uncooperative. For instance, when questioned about his prior criminal record, he was extraordinarily unforthcoming. (Tr III, 184-187). His testimony also did not line up with Sheely's, Zaborowski's, and Stover's on some points. For example, he testified

that he accompanied the three men to "about four" different bars that night. (Tr III, 196).

The forensic evidence

Police also conducted a forensic investigation in the limousine. McDade's DNA was not found on any of the items tested, nor was Etchen's. One cigarette butt that was found in the limousine likely contained DNA from both Sheely and Austin. (Tr III, 139-140). But this was the only piece of forensic evidence connecting Austin to the crime. Also, DNA from a third contributor on the cigarette butt was unidentified. (Tr III, 132-33). Further, DNA evidence from an unidentified person was found on a water bottle. (Tr III, 126). The other results of the forensic investigation were largely unremarkable. For example, Lowe's DNA was found on several items.

In-court identifications

At trial, Sheely and Stover could not positively identify Austin as the shooter. (Tr II, 68, 146). Zaborowski, though, testified that he had no doubt that Austin was the shooter. (Tr II, 117-118).

ARGUMENT

I.A. The trial court's hypothetical explanation and improvised instructions on the reasonable-doubt standard impermissibly lowered the prosecution's burden of proof.

Issue Preservation

Trial counsel neglected to object to the erroneous reasonable-doubt instructions. Therefore, this issue is unpreserved and reviewable for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Standard of Review

Under the plain error standard of review, a defendant is entitled to relief if he can show "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

Analysis

To explain the reasonable-doubt standard, the trial court gave a drawn-out hypothetical during jury selection. Occupying about seven pages of the transcript, it's too long to reproduce verbatim. (Tr I, 62-69). To summarize, the court gave an example of a bride planning her wedding. The bride envisions "a fairytale wedding on a shoestring budget." (Tr I, 63). She becomes obsessive. (Tr I, 64). One day, she's out

driving and receives a call from her fiancé. (Tr I, 63-64). He tells her that he can't have dinner with her that night because he has to pick his friend up from the airport after his flight was delayed. (Tr I, 64-65). The fiancé and his friend plan on having dinner together afterward. (Tr I, 64-65). Later, the bride sees what looks to be her fiancé's car with a passenger in it. (Tr I, 65). She follows the car until it stops at a hotel, where the fiancé gets out with another woman. (Tr I, 66). The bride waits thirty minutes and calls the fiancé's phone, which goes straight to voicemail. (Tr I, 66). Roughly two hours later, the fiancé and the other woman walk out of the hotel, hug, and get back in the car together. (Tr I, 66). When the bride calls the fiancé later, he says that he had dinner with his friend. (Tr I, 67).

The trial court asked two jurors if there was a reason to believe that the fiancé was not being truthful. (Tr I, 67). Both indicated that there was. (Tr I, 67-68). Both also indicated, at the court's prompting, that it only took them seconds to reach this conclusion. (Tr I, 67-68). The court then recited the standard reasonable-doubt instruction, M Crim JI 1.9(3), and emphasized, "It don't take long." (Tr I, 68).[7]

The trial court then continued with the hypothetical, proposing that the bride confronts the fiancé, saying that she saw him with the other woman. (Tr I, 69). The fiancé then tells the bride that she has become a "Bridezilla" and that the other woman was a wedding planner. (Tr I, 69). "It was a surprise," he says. (Tr I, 69). "I wanted to relieve you of your responsibilities in planning this wedding, because you

[7] The jury thus would have understood that the trial court's explanations served to augment the standard instruction.

became someone I didn't know." (Tr I, 69). The court then asked one juror, "Is that possible, juror number fourteen?" (Tr I, 69). "It's possible," answered the juror. (Tr I, 69). "Is it reasonable," asked the court. (Tr I, 69). "No," said the juror. (Tr I, 69). "It's not reasonable," the court affirmed. (Tr I, 69).

Immediately after, as its final point on the matter, the court compared the reasonable-doubt standard to calling up a friend and asking her opinion about something:

> That's what we're talkin' about. *We do this all the time.* We'll call somebody: "You got a minute? Girl, let me tell you what happened, today," da, da, da, da, da, da, da. "What you think?" We're asking someone's opinion, who we're giving the facts and circumstances, to use their reason and common sense to come up with a decision about whether or not that person is being truthful, or not. That's all we're asking you to do. It's simple. That's the burden of proof, okay." [Tr I, 69 (emphasis added).]

1. The trial court's instruction was erroneous, and plainly so.

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The Due Process Clause of the Fourteenth Amendment and Article I, § 20 of the Michigan Constitution guarantee that no person can be convicted of a crime unless his guilt is proven beyond a reasonable doubt. *Id*. at 364; *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). And when a court incorrectly instructs a jury on the reasonable-doubt standard, the defendant is entitled to a new trial. *Sullivan v Louisiana*, 508 US 275, 281-282; 113 S Ct 2078; 124 L Ed 2d 182 (1993); *People v Allen*, 466 Mich 86, 90-91; 643 NW2d 227 (2002). At bottom, the question is whether

any erroneous instructions created a reasonable likelihood that the jury misapplied the reasonable-doubt standard. *Victor v Nebraska*, 511 US 1, 6; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

But what precisely is "beyond a reasonable doubt?" Although the United States Supreme Court has declined to explicitly define that phrase, it has offered some important guideposts. Modern caselaw begins with *In re Winship*, 397 US 358. There, the Court explained that for the prosecution to meet its burden, a jury must be "convinced" of the defendant's guilt. *Id.* at 364 (cleaned up). "To this end," the Court added, "the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* (cleaned up).

The need for certainty was echoed in *Cage v Louisiana*, 498 US 39; 111 S Ct 328; 112 L Ed 2d 339 (1990), overruled in part on other grounds as recognized by *Estelle v McGuire*, 502 US 62; 112 S Ct 475; 116 L Ed 2d 385 (1991). There, the trial court gave the following instruction on reasonable doubt that inserted, among other things, concepts of "grave uncertainty" and "actual substantial doubt":

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere

> possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*." [*Cage*, 498 US at 40 (cleaned up; emphasis in *Cage*).]

In a brief per curiam opinion, the Court found it "plain" that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Id.* at 41. The Court added that "when those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* (cleaned up).

That said, the term "moral certainty," properly defined, does in fact adequately convey the concept of reasonable doubt. In *Victor*, the Court equated the two concepts. *Victor*, 511 US at 12.[8] The Court also examined the history behind the terms "moral evidence" and "moral certainty." The Court contrasted "demonstrable evidence" about abstract concepts from "moral evidence," which is "based on general observation of people." *Victor*, 511 US at 10-15 (cleaned up). Using this distinction, "moral certainty" refers to "certainty with respect to human affairs." *Id.* at 15.[9] As Professor Shapiro—a scholar who has extensively studied the reasonable-doubt standard—has explained,

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[8] Michigan cases from the nineteenth century also promulgated the "moral certainty" instruction. See, e.g., *People v Finley*, 38 Mich 482, 483 (1878). And it appears that the use of "moral certainty" continued well into the twentieth century. See, e.g., *People v Jackson*, 167 Mich App 388, 390–391; 421 NW2d 697 (1988).

[9] The Court also discouraged the continued use of "moral certainty" given that it is no longer a part of the modern lexicon and its meaning may have changed. *Id.* at 16-17.

two ideas convey the meaning behind "moral certainty" and "beyond a reasonable doubt":

> The first idea is that there are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration, as when we say that the square of the hypotenuse of a right triangle is equal to the sum of the squares of the other two sides. In the other, which is the empirical realm of events, absolute certainty of this kind is not possible. The second idea is that, in this realm of events, just because absolute certainty is not possible, we ought not to treat everything as merely a guess or a matter of opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of the evidence available to us increases. The highest level of certainty in this realm in which no absolute certainty is possible is what traditionally has been called moral certainty. [Shapiro, *'To a Moral Certainty': Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings LJ 153, 192-193 (1986).]

In short, jurors must be as certain as humanly possible in order to be persuaded of a defendant's guilt "beyond a reasonable doubt." See also Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329, 1374 (1971) (stating that "beyond a reasonable doubt" "insists upon as close an approximation to certainty as seems humanly attainable in the circumstances.").[10]

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[10] Professor Shapiro offered the following proposed instruction for reasonable doubt:

> We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean that you should not find the defendant guilty unless you have reached the highest

Although Michigan courts have not had occasion to address explanations of reasonable doubt such as the trial court's in this case, this Court more than a century ago condemned the comparison of the reasonable-doubt standard to "the judgment which you use in the ordinary affairs of life." *People v Albers*, 137 Mich 678, 690–691; 100 NW 908 (1904). As the Court explained, "It may be said that in the ordinary affairs of life most men never require evidence which convinces them beyond a reasonable doubt." *Id*. at 691. (cleaned up).

Other courts have strongly condemned using hypotheticals to compare a jury's decision in a criminal case to an everyday decision that the jurors would otherwise make.[11] One of the most frequently cited cases is *United States v Pinkney*, 551 F2d 1241; 179 US App DC 282, 284 (1976). There, the trial court gave the following hypothetical about a young couple deciding whether to buy a new car:

> Take a young couple who are working, they have two or three children and they have a little apartment or home. They don't have too much money in the bank, but they have an automobile that is running pretty well. One day a salesman finds out the wife of this young man might be interested in a new automobile. So he gets her number and calls her up and says I would like to have you drive this new Chevrolet, I hear you might be interested in a new car.
>
> Well, he came around the house and they went out for a ride and she fell in love with this automobile. She is ready to buy it right away, but the husband comes home at night and while having dinner, they start talking and she

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> level of certainty of the defendant's guilt that it is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom. ['*To a Moral Certainty*,' 38 Hastings LJ at 193.]

[11] Although the defense recognizes, of course, that out-of-state caselaw is not precedential, the defense asks the Court to consider it for its persuasive value, especially since it appears that there is no Michigan caselaw on point.

> tells him about this automobile she had driven and would like to go and get it right away. She is just crazy about it.
>
> The husband listens to her and he says: wait a minute, sweetheart, listen. How much money do we have in the bank? We have four or five hundred dollars, something like that; the children have to go to school this fall and they need new clothes and books and all that business.
>
> And we haven't had a vacation for five years, you see, and she starts listening and he says, don't you think we could spend this money for some other purpose or save it for a rainy day?
>
> You see, they are hesitating, talking about it, pausing. The husband says: Look, we have a nice automobile, it's running pretty well. Of course, we would like to have a new car but let's think about this.
>
> You see, they are hesitating, communicating with each other. It is a reasonable doubt they have. You can take that on through a thousand examples, whether you take a trip or not, whether you get a new job or not. [*Id.* at 1243.]

Finding the hypothetical improper, the court in *Pinkney* reasoned that "the jurors might well believe that for the defendant to prevail he must make out as strong a case against conviction as there was against buying the car." *Id.* at 1244. The court found that the trial court's example "overstated the degree of uncertainty required for reasonable doubt." *Id.* (cleaned up). The court also found that the trial court's comparison to the decision whether to buy "this clearly unnecessary new car" demeaned the reasonable-doubt standard. Likewise, the court took umbrage with the trial court's "stereotyped portrayal of the practical husband's patronizing attempt to talk sense into his flighty wife," which the court believed "trivializes the entire matter of conviction." *Id.*

Courts in Massachusetts have had—apparently more so than other jurisdictions—frequent occasion to confront similar hypotheticals. See Power, *Reasonable*

and Other Doubts: The Problem of Jury Instructions, 67 Tenn L Rev 45, 79 (1999). For example, in *Commonwealth v Ferreira*, 373 Mass 116, 128–129, 364 NE2d 1264 (1977), the trial court compared the reasonable-doubt standard to the degree of certainty needed to make an everyday "important decision":

> You must be as sure as you would have been any time in your own lives that you had to make important decisions affecting your own economic or social lives. You know, any time that you had to make an important decision, you couldn't be absolutely, mathematically sure that you were doing the right thing you weigh the pros and the cons; and unless you were reasonably sure beyond a reasonable doubt. [Cleaned up.]

The trial court continued to give examples of such important decisions, such as "whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are, and go someplace else for what you hoped was a better job." *Id.* at 129 (cleaned up). In the Supreme Judicial Court's opinion, such examples "understated and tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt." *Id.* The court provided the following unassailable explanation, worthy of quotation in full:

> The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable. [*Id.* at 130.]

Here, the trial court's freewheeling instructions demeaned the reasonable-doubt standard. The fiancée hypothetical, culminating with the court's comparison of the reasonable-doubt standard to calling up a friend and asking her opinion about a personal matter—something "we do all the time"—was glib and unbefitting. With all due respect to the trial court judge, we don't do this all the time. Being called upon to issue a verdict in a criminal case—particularly a capital case—is undoubtedly one of the most solemn duties a person will ever face. Such a decision pales in comparison to even the most important decisions we may face in our everyday lives. It isn't remotely similar to two friends talking over the phone about a personal matter—it's about whether a man spends the rest of his life in a cage without the possibility of ever getting out. The trial court trivialized the reasonable-doubt standard and thus minimized the prosecution's burden of proof. What's more, by emphasizing "It don't take long," the trial court essentially told the jurors that they could base their verdict on their gut reaction to the evidence. The trial court's explanation of reasonable doubt was, respectfully, indefensible. It was error, and plainly so.

2. The trial court's erroneous explanation of the reasonable-doubt standard affected Austin's substantial rights.

An erroneous reasonable-doubt instruction is a structural error. *Sullivan*, 508 US at 281-282; *Allen*, 466 Mich at 90-91. This Court has indicated—although not explicitly held—that structural errors automatically satisfy the third prong of the plain-error test. *Vaughn*, 491 Mich at 666. And although the United States Supreme Court has not explicitly held that structural errors automatically satisfy the third

prong of the plain-error test, it has suggested as much, holding that structural errors "are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome." *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Therefore, this Court should find that the erroneous reasonable-doubt instruction affected Austin's substantial rights.

3. The court's instruction seriously affected the fairness, integrity, or public reputation of Austin's trial.

The trial court's erroneous instruction seriously affected the fairness, integrity, and public reputation of the trial. This Court cannot dismiss a defendant's claim under the fourth prong of the plain-error test simply because it finds that the defendant suffered no prejudice or "was guilty anyway." *Vaughn*, 491 Mich at 667 (cleaned up). Instead, the Court must determine whether Austin—regardless of his guilt or innocence—was deprived of his rights under the Sixth Amendment and Article I, § 20 of the Michigan Constitution. *Id*. What's more, structural errors "necessarily render a trial fundamentally unfair." *Neder*, 527 US at 8 (cleaned up). That is, they "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Id*. at 8-9 (cleaned up). See also *United States v Dominguez Benitez*, 542 US 74, 81; 124 S Ct 2333; 159 L Ed 2d 157 (2004) (stating that structural errors "undermine the fairness of a criminal proceeding as a whole") (cleaned up).

This Court's decision in *Vaughn* is instructive for considering the fourth prong of the plain-error test. There, the trial court closed the courtroom during voir dire without any apparent cause. *Vaughn*, 491 Mich at 647. Neither party objected. *Id.* On appeal, the defendant argued that he had been deprived of his Sixth Amendment right to a public trial. *Id.* In assessing whether this error had seriously affected the fairness, integrity, or public reputation of the trial, the Court looked to the purposes served by the public-trial right, which "include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Id.* at 667. This Court found that these purposes were not undermined by the temporary courtroom closure. The Court observed that both parties vigorously pursued voir dire and expressed satisfaction with the jury that was chosen. *Id.* at 668. The Court also noted that the veniremembers essentially served as members of the public during voir dire. *Id.* The Court therefore declined to award the defendant a new trial. *Id.* at 668-669.

The present case, though, is a far cry from *Vaughn*. In *Vaughn*, the error was relatively innocuous, and the circumstances indicated that even if the letter of the law had not been followed, the purpose of the law was still fulfilled. We have no such assurances here. Again, "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Winship*, 397 US at 363 (cleaned up). The standard is premised on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372

(HARLAN, J., concurring). Also, it's "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* at 364 (opinion of the Court). Here, these values were undermined. The trial court demeaned and trivialized the jury's task, comparing it to asking for a friend's opinion over the phone. The court also suggested that the jurors could base their verdict on their gut reaction to the evidence. As a result, the jury in this case was not implementing the reasonable-doubt standard but rather a standard that was much less demanding. Consequently, the fairness, integrity, and public reputation of the trial in this case were sullied, and this Court should reverse.

4. The Court of Appeals erred by "perceiv[ing]" nothing "plainly erroneous" about the trial court judge's instructions.

According to the Court of Appeals panel, "Defendant does not identify any statements in the court's attempts to illustrate the concept of reasonable doubt that we perceive as plainly erroneous and seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Austin*, unpub op at 6 (cleaned up). But the trial court's "We do this all the time" pronouncement and succeeding commentary—by far the most objectionable part of the court's instructions—plainly don't square with this Court's admonition in *Albers* against comparing the reasonable-doubt standard to the judgment used in the ordinary affairs of life. The defense had relied on *Albers* in its briefing in the Court of Appeals, and, respectfully, it's unclear how the panel overlooked it.

The panel did concede, however, that "there were perhaps some unconventional elements in the trial court's explanations." *Austin*, unpub op at 6 (cleaned up). But the panel called attention to the trial court's recitation of "the model criminal jury instruction regarding reasonable doubt multiple times." *Id.* "Given the court's repeated recitation of M Crim JI 1.9," according to the panel, "which accurately conveyed the concept of reasonable doubt, no structural error affecting the trial court's fundamental framework occurred." *Id.* But this logic is, respectfully, specious. Because the fiancée hypothetical, topped off with the "We do this all the time" instruction, was the trial court's final, ultimate explanation on the reasonable-doubt standard, the recitations of the standard instruction were not a panacea.

The trial court addressed the concept of reasonable doubt multiple times during voir dire. At a certain point, though, reasonable doubt became the trial court's focus, as it gave multiple hypotheticals to try to illuminate the standard. The fiancée hypothetical was the final of these. Again, at one point during the hypothetical, the trial court asked two jurors if there was reason to believe that the fiancé was not being truthful. (Tr I, 67). Both indicated that there was. (Tr I, 67-68). Both also indicated, at the court's prompting, that it only took them seconds to reach this conclusion. (Tr I, 67-68). The court then recited the standard reasonable-doubt instruction, M Crim JI 1.9(3), and emphasized, "It don't take long." (Tr I, 68). The intermingling of the court's hypothetical with the standard instruction is significant, as it told the jury that the hypothetical and the court's accompanying instructions served to clarify the standard instruction. It was as if the court was saying, "Here's what we really

mean by this standard instruction." Soon after, the court gave the "We do this all the time" instruction, ending with, "That's the burden of proof, okay." (Tr I, 69).

Yes, before and after the court's problematic instructions it gave the standard instruction on reasonable doubt. But this did little to blunt the effect of the erroneous instructions. The fiancée hypothetical, culminating in the "We do this all the time" directive, was the trial court's definitive explanation on reasonable doubt. And the court plainly intended it to act as an annotation to the standard instruction. The repeated incantation of the standard instruction, then, was no cure at all given that the court had adulterated it with the erroneous instructions.

Again, the ultimate question is whether the erroneous instructions created a reasonable likelihood that the jury misapplied the reasonable-doubt standard. *Victor*, 511 US at 6. Here, because the trial court's erroneous instructions were its definitive explanation of the reasonable-doubt standard, and because the court equated its improvised instructions with the standard instructions, it is reasonably likely that the jury was misled and applied a less demanding standard than our constitutions require. Therefore, this Court should reverse and remand for a new trial.

I.B. Trial counsel rendered ineffective assistance of counsel by failing to object to the trial court's improper explanation of the reasonable-doubt standard.

Issue Preservation

The defense filed a proper motion to remand in the Court of Appeals. MCR 7.211(C)(1). Therefore, this issue is preserved for this Court's review. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

Standard of Review

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id.*

Analysis

The Sixth Amendment of the United States Constitution and Article I, §20 of the Michigan Constitution guarantee the right to the effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different."

People v Trakhtenberg, 493 Mich 38, 51; 826 NW2d 136 (2012). This Court presumes that trial counsel's decisions were "born from a sound trial strategy." *Id*. at 52.

"Yet a court cannot insulate the review of counsel's performance by calling it trial strategy." *Id*. at 52. Counsel's strategy must in fact be sound and decisions made in accordance with that strategy must be objectively reasonable. *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

Relevant to this case, counsel may be deemed ineffective if he fails to object to improper jury instructions. *People v Kowalski*, 489 Mich 488, 510 n 38; 803 NW2d 200 (2011); *Joseph v Coyle*, 469 F3d 441, 460–461 (CA 6, 2006).

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. That is, the defendant must show "a probability sufficient to undermine confidence in the outcome." *Id*. Stated yet another way, the defendant must show that without trial counsel's error, there's a reasonable probability that at least one juror could have harbored a reasonable doubt. *Buck v Davis*, ___ US ___, ___; 137 S Ct 759, 776; 197 L Ed 2d 1 (2017). This does not require the defense to show that trial counsel's error more likely than not affected the outcome of the trial. *Harrington v Richter*, 562 US 86, 111-112; 131 S Ct 770; 178 L Ed 2d 624 (2011).

In the alternative, reversal may be required if counsel's deficiency rendered the trial fundamentally unfair, without regard to whether there is a reasonable probability of a different outcome. *Weaver v Massachusetts*, ___ US ___, ___; 137 S Ct 1899,

1911; 198 L Ed 2d 420 (2017). The Court in *Strickland* held that the prejudice inquiry is not to be applied "mechanical[ly]." *Strickland*, 466 US at 696. Rather, "the ultimate focus of inquiry must be on the fundamental fairness of" the trial. *Id.*

Here, trial counsel's failure to object to the erroneous reasonable-doubt instruction was objectively unreasonable. The reasonable-doubt standard is perhaps the most powerful asset at a defendant's disposal. There can be no reasonable strategy for failing to object to an instruction that undermines that standard.[12] And, as explored above, the trial court's instruction indeed undermined the standard, comparing it to asking a friend's opinion about a personal matter over the phone. This explanation demeaned and trivialized the burden of proof. Therefore, trial counsel's performance was deficient.

And trial counsel's error prejudiced Austin. The United States Supreme Court has left open the possibility that an erroneous reasonable-doubt instruction raised under the guise of an ineffective-assistance claim may require automatic reversal. *Weaver*, 137 S Ct at 1911-1912. What's more, the Court indicated that when an erroneous reasonable-doubt instruction is given, "the resulting trial is always a fundamentally unfair one," and "it would therefore be futile for the government to try to show harmless." *Id.* at 1908 (cleaned up). A trial infected with an erroneous

[12] As stated in the offer of proof attached to the motion to remand filed in the Court of Appeals, trial counsel had no recollection of the trial court's instruction and could not provide any strategic reason for failing to object. This Court can consider this material in determining whether remand for a *Ginther* hearing is warranted. *People v Moore*, 493 Mich 933; 825 NW2d 580 (2013).

reasonable-doubt instruction is inherently unreliable. *Sullivan*, 508 US at 281. Therefore, the defense submits that automatic reversal is appropriate.[13]

Even if this Court declines to endorse automatic reversal, reversal is still appropriate because the trial was in fact fundamentally unfair. *Weaver*, 137 S Ct at 1911. Again, the reasonable-doubt standard is a hallmark of our criminal justice system. An erroneous reasonable-doubt instruction—a structural error—is intrinsically harmful. *Neder*, 527 US at 7. And here, rather than simply making some kind of technical error, the trial court's instructions demeaned and diminished the prosecution's burden of proof. A trial at which a defendant can be convicted based on a lower standard of proof is necessarily a fundamentally unfair one. See again, *Weaver*, 137 S Ct at 1908.

Finally, reversal is appropriate because there's a reasonable probability that the outcome of the trial would have been different without the erroneous instruction. The evidence in this case left room for reasonable doubt. Sheely, Zaborowski, and Stover all positively identified other suspects in photo arrays. At trial, only Zaborowski positively identified Austin. Etchen proved to be a difficult witness on cross-examination, undermining his credibility as a whole. Finally, the forensic evidence was not dispositive. Austin's DNA was found on a cigarette butt—along with Sheely's—but not anywhere else in the limousine. There remained the possibility that

[13] The defense notes that at least one federal court has endorsed this analysis, albeit in an unpublished opinion. *Brooks v Gilmore*, unpublished opinion of the United States District Court for the Eastern District of Pennsylvania, issued August 11, 2017 (No. 15-5659), 2017 WL 3475475. This Court should adopt the same cogent analysis.

Sheely and Austin had shared a cigarette at some other point in the night, perhaps at the bar that the three friends went to after the concert. What's more, there was an unidentified third DNA contributor on the cigarette butt as well as unidentified DNA on a water bottle, raising the possibility that someone other than Austin could have been the shooter. Was the evidence against Austin necessarily weak? To be candid, no. But it did leave room for reasonable doubt. The jurors, though, were discouraged from carefully weighing the evidence. Instead, they were told that they could base their verdict on their instinctual response to the evidence and that they could give the case as much consideration as they would to a friend calling to ask for an opinion on a personal matter. Therefore, without trial counsel's error, it's reasonably probable that at least one juror could have harbored reasonable doubt.

Although the defense submits that there could be no strategic reason for failing to object to the trial court's instruction, a *Ginther* hearing is warranted to make a record on this issue.[14]

II. Even assuming that the prosecution's theory of the case was true, the felony-murder charge didn't fit the facts of the case.

Issue Preservation

Although no action is required to preserve this issue for appellate review, *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999), it bears mention that trial counsel did object to the felony-murder instruction, arguing that the evidence did not

[14] The Court of Appeals rejected this claim given that it had held that the trial court committed no error in its reasonable-doubt instructions. *Austin*, unpub op at 10.

support such a charge. (Tr IV, 4-5). Therefore, although counsel's objection was not required to preserve this issue, the objection at least gave the court an opportunity to correct its own error. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988) ("The concept of sufficiency focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law.").

Standard of Review

"In determining whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution, and considers whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014).

Analysis

1. The killing in this case did not occur during the res gestae of the felony.

Before closing argument, trial counsel moved the court to dismiss the felony-murder charge. (Tr V, 4-5). He argued that the robbery occurred after the murder and therefore that the murder was not committed in the course of a felony. (Tr V, 5). The trial court denied the motion, explaining that "in the course of" means "before, during, or after, until the completion of the crime." (Tr V, 5).[15]

[15] But the court also said that "in the course of" did not mean "before" or "prior to." (Tr V, 5). Given the court's ruling, the defense presumes that the court misspoke.

The due process clauses of the state and federal constitutions require that the prosecution in a criminal case introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, 460 Mich at 757 (cleaned up). But "some evidence" of guilt is not enough. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). "In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt." *Id*.

Murder committed "in the perpetration of, or attempt to perpetrate" certain enumerated felonies is felony-murder. MCL 750.316. In *People v Gillis*, 474 Mich 105, 126-127; 712 NW2d 419 (2006), this Court definitively explained the meaning of "in the perpetration of" as used in the felony-murder statute. The Court adopted the res gestae principle in felony-murder cases: "Where the homicide is committed within the

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Further, it appears that the trial court confused the "in the course of" element of the armed robbery charge with the felony-murder charge. See MCL 750.529; MCL 750.530; M Crim JI 18.1.

res gestae of the felony charged, it is committed in the perpetration of, or attempt to perpetrate, the felony." *Id.* at 119 (cleaned up). The Court noted that this may comprise acts that precede the killing. *Id.* at 116 n 6. The Court also quoted the following points from Wharton, Law of Homicide (3d ed), § 126, pp 184-186, for the proposition that there must be a causal connection between the felony and the killing:

> - "[The killing] must have been done in pursuance of the unlawful act, and not collateral to it. The killing must have had an intimate relation and close connection with the felony, and not be separate, distinct, and independent from it."
> - "There must have been such a legal relationship between the two that it could be said that the killing occurred by reason of, or as a part of, the felony." [*Gillis*, 474 Mich at 119-120 (cleaned up).]

The Court also noted that four factors should be considered when determining whether the killing was in the perpetration of the felony: "(1) time; (2) place; (3) causation; and (4) continuity of action." *Id.* at 127, citing 2 LaFave, Substantive Criminal Law, § 14.5(f), p 463. Ultimately, " 'more than a mere coincidence of time and place is necessary' for a murder to qualify as a felony murder." *Gillis*, 474 Mich at 120, quoting LaFave, Substantive Criminal Law (2d ed), § 14.5(f), p 465.

Felony-murder was an incorrect charge in this case for two reasons. First, the murder was not committed during the res gestae of the robbery. For purposes of the felony-murder doctrine, the res gestae "typically begins when the actor has reached the point at which she could be prosecuted for an attempt to commit the felony." Dressler, Understanding Criminal Law (5th ed), §31.06[C][3][b], p 530 (cleaned up), citing *Payne v State*, 81 Nev 503, 507; 406 P2d 922 (1965) ("The res gestae of the crime

begins at the point where an indictable attempt is reached.") (cleaned up). See also 40 Am Jur 2d Homicide § 68 ("The res gestae of the underlying crime begins where an indictable attempt is reached.") (cleaned up); *Moody v State*, 841 So 2d 1067, 1091 (Miss, 2003) ("The res gestae of the underlying crime begins where an indictable attempt is reached.") (cleaned up).

Here, even assuming that the shooter conceived to rob Sheely, Zaborowski, and Stover at some point before the shooting, his efforts had not reached the point at which he could have been charged with attempted armed robbery. See, e.g., *People v Patskan*, 387 Mich 701, 714; 199 NW2d 458 (1972) ("Intent alone is not enough to convict a person of a crime."). "An attempt consists of: '(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.' " *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), quoting 2 LaFave & Scott, Substantive Criminal Law, § 6.2, p 18. "Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime." *Jones*, 443 Mich at 100. The acts done in furtherance of the attempt must be unequivocal. *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002). "There must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." *People v Coleman*,

350 Mich 268, 277; 86 NW2d 281 (1957) (cleaned up). In other words, "the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." Id. (cleaned up).

Here, then, even assuming that the attempt to rob had been conceived well before the killing, nothing the shooter had done before the killing would have led immediately to the completion of the armed robbery. Otherwise, the shooter equally could have been arrested for attempted armed robbery as soon as he got into the car with the three young men.

The second reason that felony-murder was an incorrect charge here was that, even taking the facts in the light most favorable to the prosecution, the killing was not causally connected to the robbery. Sheely, Zaborowski, Stover, and Etchen all testified that Lowe and the shooter had been arguing over drugs and that the shooter fired at Lowe after Lowe lunged at him. Only afterward did the shooter rob Sheely, Zaborowski, and Stover. In other words, the shooter did not kill Lowe in order to accomplish the robbery; he shot Lowe to defendant against Lowe's attack. Thus, the shooting was collateral to and independent from the eventual robbery. *Gillis*, 474 Mich at 119-120.

Ordinarily, the remedy in this instance would be to vacate the felony-murder conviction and remand for entry of a second-degree murder conviction. See *People v Bearss*, 463 Mich 623, 632–633; 625 NW2d 10 (2001). But as stated in the next issue presented, trial counsel was ineffective for not requesting a manslaughter instruction. The jury in this case should have been tasked with choosing between second-

degree murder and manslaughter, not felony-murder and second-degree murder. Therefore, a new trial is the appropriate remedy. See *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995) (stating that the remedy for a constitutional violation must be tailored to the injury).

2. The Court of Appeals misconstrued the felony-murder doctrine as explained by this Court in *Gillis*.

Respectfully, the Court of Appeals panel committed several errors in its discussion of the felony-murder doctrine in Michigan. The original sin of the panel's analysis is its holding that the felony-murder doctrine is satisfied by a mere showing that the intent to commit the felony was formed before the murder. The court quoted *People v Orlewicz*, 293 Mich App 96, 111; 809 NW2d 194 (2011), for this point, saying that "the defendant need only have intended to commit the underlying felony when the murder occurred." *Austin*, unpub op at 7. The court in *Orlewicz* had relied on *People v Brannon*, 194 Mich App 121; 486 NW2d 83 (1992), for this proposition. Relying on this caselaw, the Court of Appeals panel found that "the jury could reasonably have inferred that defendant intended to steal from the limo's occupants when he got into the vehicle, and even when he began interacting with them at the Delux Lounge and identified them as robbery targets." *Austin*, unpub op at 9.[16]

[16] Relatedly, the panel incorrectly framed the defense's argument thus: "Defendant argues that there is no evidence that he formed the intent to commit a larceny at or before the time of the shooting." *Austin* unpub op at 7. That was not the defense's argument. Rather, the defense argued that while there may be evidence that the shooter had planned the robbery before the killing, any such plans had not reached the point of an attempt at the time of the killing.

But under *Gillis*, it's not enough for the defendant to have formed the intent to commit the felony at the time of the murder. Instead, *Gillis* commands that the murder must be committed during the res gestae of the felony. And, as explored above, for purposes of the felony-murder doctrine, the res gestae begins when the defendant has reached the point at which he could be prosecuted for an attempt to commit the felony. In short, intent coupled with preparation will not suffice.

The standard jury instruction on felony-murder recognizes this point. For a murder committed during an attempted felony to qualify as felony-murder, "It is not enough to prove that the defendant made preparations for committing the crime." M Crim JI 16.4(6). "Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt." *Id*. Instead, "the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances." *Id*. Although the standard instruction does not have the force of law, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985); MCR 2.512(D), the defense submits that it encapsulates the correct reading of *Gillis*. The Court of Appeals' analysis in this case, then, was incorrect.

Next, the Court of Appeals panel stated, "The jury could find that the evidence showed a 'causal connection' between the underlying felonies of the larcenies committed against the three friends and the murder of the limo driver." *Austin*, unpub op at 9. But the panel then merely referenced the fact that the jury could have found that the shooter planned the robbery before he got into the limousine. *Id*. This does

not establish a causal connection. In other words, there was no evidence that the shooter's desire to rob Sheely, Zaborowski, Stover led him to commit the murder. Instead, by all accounts, the shooter killed Lowe only after Lowe first attacked him, which was unrelated to the robbery.

As its final word on the matter, the Court of Appeals panel wrote, "Whether defendant's conduct that led to the shooting was controlled by his desire to commit a larceny or determined by his argument over a drug transaction presented an issue for the jury's determination, and under the facts and circumstances of the killing, we will not disturb its finding." *Austin*, unpub op at 10. Respectfully, this sentence appears to reflect an abdication by the Court of Appeals panel to fully review whether the evidence established—beyond a reasonable doubt—a causal connection between the felony and the killing. For the reasons stated, the evidence didn't establish that connection, and this Court should reverse.

III. Trial counsel rendered ineffective assistance by failing to request a voluntary manslaughter instruction.

Issue Preservation

The defense filed a proper motion to remand in the Court of Appeals. MCR 7.211(C)(1). Therefore, this issue is preserved for this Court's review. *Ginther*, 390 Mich at 443-444.

Standard of Review

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc*, 465 Mich at 579. Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id.*

Analysis

1. Given that the evidence showed that the shooter killed Lowe after Lowe attacked him, trial counsel should have requested a manslaughter instruction.

Under the Sixth Amendment of the United States Constitution and Article I, § 20 of the Michigan Constitution, trial counsel may be deemed ineffective if he fails to request appropriate jury instructions. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001); *Coyle*, 469 F3d at 460–461. See also Burkoff & Burkoff, Ineffective Assistance of Counsel, § 7:48 (collecting cases).

Here, the jury should have been instructed on the lesser offense of voluntary manslaughter. Voluntary manslaughter is a killing committed in the heat of passion brought on by an adequate provocation. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). There cannot be a lapse between the provocation and the killing such that a reasonable person could have controlled his passions. *Id.* In other words, the killing must be "the result of a temporary excitement." *Id.*, quoting *Maher v People*, 10 Mich 212, 219 (1862). The killing is not excused but mitigated "out of indulgence to the frailty of human nature." *Pouncey*, 437 Mich at 388, quoting *Maher*, 10 Mich at 219. A violent attack has long been held to be sufficient provocation to

mitigate a killing to manslaughter. *Brownell v People*, 38 Mich 732, 737 (1878); 2 LaFave, Substantive Criminal Law (3d ed), § 15.2(b)(1). And a trial court is required to instruct a jury on voluntary manslaughter if a rational view of the evidence supports such a charge. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

Here, the evidence indeed supported a voluntary manslaughter instruction. The testimony showed that Lowe and the shooter were incessantly arguing about the cocaine. Sheely testified that there were "countless attempts to try and sq—squelch the argument." (Tr II, 50). Etchen described the tenor of the argument as "aggressive" and "angry." (Tr III, 163). Immediately before the shooting, Lowe had apparently started to back the limousine up, but then he quickly put it in park and came to the back of the limousine. (Tr II, 137). Lowe then came at the shooter, lunging or diving at him with his arms extended. (Tr II, 76-77, 96-97). Zaborowski described it as Lowe "rush[ing]" the shooter. (Tr II, 95). The evidence also showed that Lowe was high on cocaine at the time he attacked the shooter. A rational view of this evidence supports the conclusion that the shooter only fired on Lowe once he attacked him and that the shooting thus happened as the result of a temporary excitement. Therefore, the jury should have been instructed on manslaughter.

Trial counsel performed deficiently by neglecting to request a manslaughter instruction. Given the evidence in the case, the defense cannot surmise any strategic reason why trial counsel would not request a manslaughter instruction.[17]

[17] As stated in the offer of proof attached to the motion to remand filed in the Court of Appeals, trial counsel did not in fact offer any strategic reason for not requesting a manslaughter instruction. Nor did he indicate that he or Austin would have been

And trial counsel's failure prejudiced Austin. The evidence of provocation was clear cut. It was undisputed that the shooter fired on Lowe only after Lowe's cocaine-fueled attack. If the jurors had been instructed on voluntary manslaughter, it's reasonably probable that they would have convicted of that offense rather than felony-murder.

Although the defense submits that there could be no strategic reason for failing to request a manslaughter instruction, a *Ginther* hearing is necessary to make a record on this issue.

2. The Court of Appeals erred by neglecting to consider whether remand was appropriate and by imagining strategic reasons for declining a voluntary manslaughter instruction that aren't supported by the record.

The defense moved the Court of Appeals to remand for a *Ginther* hearing under MCR 7.211(C)(1) so the defense could make a record in the trial court on its claims of ineffective assistance. The court initially denied the motion but said, "Denial of remand is without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *People v Austin*, unpublished order of the Court of Appeals, entered March 11, 2019 (Docket No. 344703). But the case call panel never analyzed whether remand was appropriate, saying only that the motion to remand had been denied and therefore the panel's review was "limited to errors apparent from the record." *Austin*, unpub op at 10. The defense

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unhappy with a voluntary manslaughter verdict. This Court can consider this material in determining whether remand for a *Ginther* hearing is warranted. *Moore*, 493 Mich 933.

submits that the panel erred by declining to consider whether remand was appropriate, a task that was implicit in the motion panel's order.

In any event, the Court of Appeals case call panel went on to commit additional errors in its analysis. The court recognized that a voluntary manslaughter instruction would have been supported by the evidence. *Id.* at 11. But the court found that "a request for an instruction on voluntary manslaughter would have been inconsistent with the defense argument that defendant was not inside the limo and was not the shooter." *Id.* (cleaned up). The logic seems to be that if trial counsel had requested a voluntary-manslaughter instruction, he would have been obligated to argue that theory to the jury. Not so. The defense is aware of no authority requiring trial counsel to argue a particular theory to a jury simply because he requested a certain instruction. It's not at all unusual to see prosecutors, for example, request instructions on lesser offenses and then argue strenuously in closing that the jury should convict on the greater offense. Here, trial counsel could have argued for acquittal in closing but requested a voluntary manslaughter instruction as a safety valve.[18]

What's more, given that trial counsel could offer no good reason for declining to request a voluntary manslaughter instruction, it appears that trial counsel conducted a less than full investigation into potential legal strategies for trial. In other words, it appears that trial counsel didn't make a strategic decision to forgo a voluntary manslaughter instruction; he failed to consider that strategy at all. "An

[18] It deserves mention, too, that the defense was—at least to a certain extent—amenable to resolving the case with a plea bargain. (Tr I, 4-5). It would appear, then, that a conviction on a lesser charge would not have been altogether unwelcome.

attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v Alabama*, 571 US 263, 274; 134 S Ct 1081; 188 L Ed 2d 1 (2014).

Finally, the Court of Appeals panel found that "because the jury was presented with the option of convicting defendant of second-degree murder, but instead convicted him of the greater offense of felony murder, defendant has not shown that he was prejudiced by counsel's failure to request a manslaughter instruction." *Austin*, unpub op at 11.[19] True, the jury was instructed on second-degree murder (Tr V, 69) and did not convict on that charge. But this tells us relatively little. Both felony-murder and second-degree murder require a finding of malice. *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990), citing *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Felony-murder, of course, includes the added element that the murder be committed during the course of an enumerated felony. *Hughey*, 186 Mich App at 591.[20] Here, then, if the evidence failed to show that the killing occurred during the commission of a felony, the jury could convict—at most—of second-degree murder.

But with voluntary manslaughter, whether the murder was committed during the course of a felony is of no moment. With voluntary manslaughter, malice is

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[19] The court cited only *People v Wilson*, 265 Mich App 386; 695 NW2d 351 (2005), which was not a murder case. *Id.*

[20] The trial court explicitly instructed the jury on this, adding "What's different in count five—is element five. And that is, for felony murder, which does not exist for second degree murder, that the defendant was committing, or attempting to commit, a specified felony at the time of causing the victim's death, which here is larceny." (Tr V, 69-70).

negated because the shooter was provoked and acted in the heat of passion. *Mendoza*, 468 Mich at 536. A voluntary manslaughter theory, then, undercuts an element that felony-murder and second-degree murder share. Therefore, for a jury tasked with considering felony-murder and second-degree murder, voluntary manslaughter represents a third way. At bottom, then, contrary to the Court of Appeals' analysis, it doesn't follow that because the jury convicted of felony-murder that they necessarily would not have convicted on voluntary manslaughter.[21]

This Court should remand this case for a *Ginther* hearing on this issue.

[21] Plus, the defense argues that the jury erroneously convicted of felony-murder without sufficient evidence showing that the murder was committed during the res gestae of the felony.

RELIEF REQUESTED

Deandre Austin is spending life in prison without the possibility of parole based on a trial that suffered from significant errors. This Court should grant this application and reverse and remand for a new trial or remand for a *Ginther* hearing. Alternatively, given the Court of Appeals' failure to correctly identify the errors in this case, this Court could remand to the Court of Appeals for further consideration on whether the errors merit reversal or other relief. The defense also asks the Court to grant any different or further relief the Court deems appropriate.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANDRE TERREL AUSTIN,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 344703

Circuit Court No. 17-010362-01 FC

PROOF OF SERVICE

I certify that on March 10, 2020, I served a copy of Defendant-Appellant's Application for Leave to Appeal upon the following individual by e-service:

Wayne County Prosecutor

And I served, by first-class mail, a Notice of Filing of the Application for Leave to Appeal to:

Clerk of the Court
Michigan Court of Appeals
Hall of Justice
925 W. Ottawa Street
Lansing, MI 48909

Clerk of the Court
Wayne Circuit Court
1441 St. Antoine
Detroit, MI 48226

/s/ Timothy A. Doman
Timothy A. Doman (P77811)